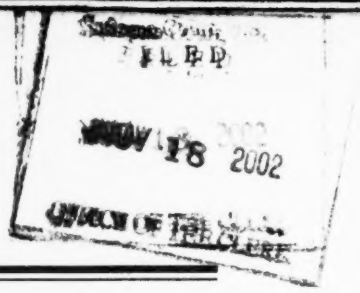

No. 02-595

IN THE

Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,

Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF REASONS FOR DENYING THE PETITION

The Petition lacks merit because it hinges entirely upon a one-sided view of the factual record that was squarely rejected by the jury, district court and court of appeals below. Numerous misstatements of fact (and law) are made and key evidence is omitted. For those reasons, this Brief begins with a statement of relevant facts from the trial record.

The Petitioner was found negligent because it provided the Army with false piloting instructions that caused the subject helicopter crash. The Army had no involvement in preparing those instructions and relied on the Petitioner to provide correct safety information.

The district court and court of appeals faithfully applied the defense established by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). There is no conflict (as Petitioner suggests) but rather unanimous agreement among the circuit courts that the *Boyle* defense is inapplicable where: (1) the government had no opportunity for an informed exercise of its discretion; and (2) there is no significant conflict between the contractor's state law duty to warn and the federal contract. The three cases cited by Petitioner as the basis for a circuit conflict involve completely different factual circumstances where the government had actual knowledge of the dangers and made an informed decision regarding a product's warnings.

The jury was properly charged on the *Boyle* defense elements. The Petitioner did not object to that charge at trial pursuant to Fed. R. Civ. P. 51 and is barred from claiming error.

Neither the Second Circuit's opinion, nor the record below, raise the questions presented in the Petition. The "prescribe/proscribe rule" fabricated by Petitioner has never been followed by any court, including the court of appeals below.

Respondents therefore respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

STATEMENT OF RELEVANT FACTS FROM THE TRIAL RECORD

These wrongful death and personal injury actions arise from the 1993 crash of a U.S. Army UH-60A Blackhawk helicopter making a routine landing approach at the Weisbaden, Germany airport. A433, A436.[1] The plaintiffs are the pilot and a passenger who survived the crash and the widows of four deceased passengers. The defendant United Technologies Corp. ("UTC") designed and manufactured the helicopter with an external stores support system (ESSS) that held right and left external auxiliary fuel tanks. E104, E301. The accident helicopter was sold to the Army in 1988.

The accident investigation findings. The official Army investigation report concluded that at the time of the crash the aircraft's left ESSS fuel tank was empty while the right ESSS tank was nearly full and that the resulting lateral center-of-gravity ("CG") imbalance rendered the aircraft uncontrollable. E313 ¶6, E316 ¶17, E323, E359-60. As the pilots attempted to level out of a shallow right turn, the helicopter "did not respond to the pilot's attempt to control the aircraft," "could not be stopped from turning" and crashed. A434, A437, E313, E316, E323. The Army report

1. References herein to "A__" are to the Joint Appendix and "E__" to the Exhibits filed in the court of appeals.

concluded that the pilots acted properly and were not responsible for the crash. E315, E316, E320 ¶ 39, E321 ¶48.[2]

The Army Safety Center concluded that the crash was caused by "inadequate . . . notes, cautions, warnings and emergency procedures in the aircraft operator's manual. . . ." E662.

UTC's own accident investigator admitted that:

> *the pilots were blind sided* by multiple conditions that they were unaware of. . . . If it had not happened to them, it was bound to happen to someone else under the same aircraft loading and environmental conditions. The chain-of-events was circumstance.

E666 (emphasis added).

The Army and its pilots were "blind sided" because prior to the crash UTC repeatedly misled the Army by stating that the Blackhawk was "controllable," had "adequate flight control margins" and was "flyable" with one empty and one full ESSS fuel tank.

UTC's operator's manual. UTC prepared the original operator's manual for the ESSS equipped Blackhawk. UTC's

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2. UTC's claim that "the crash was caused by diminished control," Petition at 2, is contrary to the Army's determinations that the helicopter was uncontrollable and the testimony of both pilots. A434, A437, E316 ¶17, E359-60. Likewise, UTC's assertion that the helicopter "exceeded the prescribed flight envelope," Petition at 3, is wrong because UTC did not set lateral CG limits and told the Army that the helicopter could be safely operated with a lateral full ESSS fuel tank imbalance. E19, A411.

manual misinformed the Army that "*[t]he helicopter is controllable even if a single [ESSS] tank set is fully asymmetric (one empty/one full).*" E548 (emphasis added). UTC's manual established detailed longitudinal (fore-aft) CG requirements. No similar lateral CG requirements were provided. A433, A529.

Each year before the crash, UTC delivered new Blackhawk helicopters and was paid by the Army to revise and update the operator's manual, yet the manufacturer never corrected its false advice that the helicopter was "controllable" with unequal ESSS fuel loads. E668-69, A441, A505, A527, A533, A534.[3]

UTC's advice to the Army. UTC told the Army that:

> *The aircraft is flyable with a single full 230 gallon fuel tank . . . on one side of the ESSS*; however, stick margins are reduced. Abrupt maneuvers should be avoided and particular care should be taken during the final approach to the hover.

E299, E549 ¶4 (emphasis added). UTC's erroneous advice was incorporated into Army airworthiness releases (AWRs) in 1988, 1989 and 1990 and was never withdrawn by UTC prior to the crash.

UTC's contract. UTC's contract specifications for the ESSS equipped Blackhawk, the Critical Item Development

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3. UTC makes the misleading argument that the Army directed UTC "to *remove* from the manual a provision that [UTC] had drafted . . ." Petition at 6. But UTC ignores that this section was removed because the Army was acting in reliance on UTC's false information that the helicopter was "controllable." E548.

Specifications ("CIDS"), promised that the helicopter would have "*adequate flight control margins*." E19, A466. UTC admitted that this contract term meant that the aircraft must be controllable in foreseeable flight conditions. A465.

The terms of the Blackhawk contract required that UTC "shall conduct sufficient tests throughout the flight envelope to determine the aircraft controllability characteristics." E484. The Airworthiness Qualification Specification ("AQS") prepared by UTC required it "to prepare test plans, test reports and analytical substantiations." E53. The testing was supposed to include landing approaches "at low indicated airspeeds" with "[a] full range of gross weights and center of gravity locations. . . ." E484.

The contract also required UTC to "provide, implement and maintain a system safety program," and specifically, under the system safety integration process, to "identify all hazards associated with the potential mission applications of the ESSS. . . ." E282, E486-87, E662. These system safety obligations continued after the sale of the aircraft up until the time of the crash. E668-69.

In a 1991 revision to its specifications, UTC added a note that "[h]andling qualities and performance are degraded at extremes of lateral CG." E688. This note perpetuated UTC's false statements that the helicopter was "flyable" and "controllable" with one empty and one full ESSS tank. A527.

Army reliance on UTC. The Army relied on UTC's specifications, which promised that the Blackhawk/ESSS would have "adequate flight control margins" with unequal ESSS fuel loads. A498. The Army did not attempt to verify UTC's claims that the Blackhawk was "controllable" and

"flyable" with one full and one empty ESSS tank. A422-25, A505. Because of those representations, it was common knowledge among Army Blackhawk pilots that it was safe to fly with an ESSS fuel imbalance. A433, A435. Army Captain Sandman, who conducted a 1991 flight review of the Blackhawk, believed and relied on UTC's representations that the Blackhawk/ESSS was "flyable" with one full and one empty ESSS tank. A423, A428.[4]

UTC's post-crash warnings. After the subject crash, UTC abandoned its advice to the Army that the aircraft was "controllable" and "flyable" with one full and one empty ESSS tank and added new warnings to the operator's manual regarding flight operations with unequal ESSS fuel loads, including:

- Do not turn in the direction of the lateral imbalance . . .
- Use run-on landing techniques with touchdown speed in excess of 35 knots . . .
- Land as soon as practical. . . .

---

4. UTC makes the highly misleading claim that Captain Sandman warned about operations with unequal fuel loads. Petition at 23 n.7. The portion of the document cited by UTC involved a *completely different* "self-deployment" configuration of the helicopter with four ESSS tanks holding a total of 680 gallons on each side, *not* the subject "baseline" model with two 230 gallon tanks. E104, E132.

UTC also cites to an internal memo of a visiting RAF pilot, Andrew Tailby, to Captain Sandman. Petition at 23 n.7. The memo questioned the accuracy of UTC's advice that the aircraft was "flyable" with one full and one empty ESSS tank. E549-50. No proof was offered that Tailby's memorandum was sent to anyone other than Captain Sandman before the crash.

E411, A522-23. UTC never proposed these or similar warnings to the Army for inclusion in the operator's manual prior to the crash. E306, E401-02, A528-529.

UTC's trial evidence. UTC presented no evidence of analyses or tests that supported its erroneous advice that the Blackhawk was "controllable" and "flyable" with one full and one empty ESSS tank.

UTC contended that the pilots were negligent, relying on the expert testimony of a UTC flight test pilot who opined that the aircraft was controllable and special piloting techniques such as a straight run-on landing should have been used to avert the crash. A519, A528-29. Those techniques were known to UTC prior to the crash but not shared with the Army or its pilots until after the crash. A522-23, A529. UTC's expert disagreed with UTC's prior admission that the pilots were "blind sided." A525.

UTC relied on the testimony of Charles Crawford, the retired technical director of the Aviation Systems Command, known as AVSCOM, that the Army approved UTC's conduct of jettison tests proposed in UTC's original AQS. A489. Crawford acknowledged, however, that UTC subsequently promised in its CIDS that the ESSS equipped Blackhawk would have "adequate flight control margins," *i.e.*, that it would be controllable in all foreseeable flight conditions as specified by a "limited flight envelope." E84, E19, A492, A466. Significantly, on cross-examination, Crawford was confronted with his deposition testimony that he "did not know" if "there was ever a determination by [UTC] and the government of the limited flight envelope . . ."[5] A503. UTC's

5. Crawford's credibility was questioned not only because of his prior inconsistent statement but also his business dealings with UTC (Cont'd)

own Vice President was also unable to define the same flight envelope. A466, A470.

Contrary to UTC's claims, Crawford acknowledged that the Army set no restrictions on testing and UTC could have performed or proposed additional tests. A505. He also conceded that the Army relied on the accuracy of the information provided by UTC in making flight testing decisions. A498.

PRIOR PROCEEDINGS

The jury determined that the subject crash was caused by UTC's negligence, because it "failed to warn the Army that the 'product' could become uncontrollable during foreseeable flight conditions. . . ." A611. The jury made additional special verdict findings that plaintiffs failed to prove their other liability claims.

The negligence charge permitted the jury to consider UTC's entire conduct, both before and after the sale. A300-02. UTC incorrectly reads the verdict to mean that UTC "breached a *post-sale* duty to warn," and that UTC had "fully complied" with the Army specifications at the time of delivery. Petition at 7-8, 22.[6]

(Cont'd)
after retirement (including ten years as a paid consultant to UTC) and his personal friendship with several UTC employees. A500-501.

6. The defense verdict on strict liability did not time-limit the negligence verdict. The strict liability charge asked whether "at the time of sale" the "product" as delivered was defective. A292, 298. That "product" was expressly defined as a Blackhawk helicopter
(Cont'd)

The jury also found that UTC failed to prove its defenses to the negligence claim, including the pilot's comparative negligence and the government contractor defense. A614, A615-616.[7]

The district court entered a lengthy ruling denying UTC's post-trial motions. *Densberger v. United Technologies Corp.*, 125 F. Supp. 2d 585 (D. Conn. 2000).

A unanimous panel of the Second Circuit Court of Appeals affirmed the judgment. *Densberger v. United Technologies Corp.*, 297 F.3d 66 (2d Cir. 2002).

(Cont'd)
"with hard points capable of accepting an ESSS kit, and an ESSS kit" but "*without* fuel tanks." A291. The parties stipulated that UTC had not manufactured the fuel tanks, which were installed *after* the sale. A293. Unlike the strict liability charge, the negligence instruction did not restrict the jury to consider the helicopter "without fuel tanks" and "at the time of sale." A300-02, A291-92. The jury was entitled to find that the "product," *i.e.*, the helicopter at the time of sale *without* tanks installed, was not defective, while UTC negligently failed to warn of the dangers of using those tanks.

7. The jury entered awards for death and injury damages that ranged from $125,000 to $7,750,000 for the pilot, who suffered extensive burns. A618-620. UTC did not challenge the amount of these awards in its appeal.

REASONS FOR DENYING THE PETITION

I. SUBSTANTIAL EVIDENCE IGNORED BY THE PETITION SUPPORTED THE JURY'S VERDICT THAT UTC WAS NOT ENTITLED TO THE *BOYLE* DEFENSE

Boyle based its defense on the "discretionary function" exemption of the Federal Tort Claims Act and thus barred suits critical of product designs that "reflect a significant policy judgment by government officials. . . ." *Id.* at 513. *Boyle* protects the government's exercise of "judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.* at 511. *Boyle* established three necessary elements of the defense in a design defect case:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512. This Court explained that:

> The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated — *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely the contractor itself.

Id.

A. The exercise of government discretion fundamental to the *Boyle* defense was not established.

There was no proof below that the Army made a "significant policy judgment," "trade-off" or other exercise of discretion because the Army relied to its detriment on UTC's false instructions that the Blackhawk was "controllable" and "flyable" under the exact flight conditions encountered when the accident airplane became uncontrollable and crashed.

Nor was there evidence that the Army made any substantive review or evaluation of UTC's false statements (and UTC did not come forward to explain how it justified making such statements). Indeed, UTC admitted that the Army was "blind sided." E666. UTC's claim that the Army had "complete control" over the manual warnings to pilots is bogus. Petition at 6.

The military contract did not empower UTC to issue false flight safety instructions. Moreover, by repeatedly giving misinformation and failing to correct its errors, UTC violated its specific ongoing responsibilities to provide a system safety program, identify all hazards associated with the ESSS, and update the operator's manuals. E282, E486-87, E662, E668-69, A463, A527, A534.

B. The *Boyle* requirement of a "significant conflict" between state law and the government contract is absent from this case.

The *Boyle* defense pre-empts only those state tort laws that are in "significant conflict" with the relevant government exercise of discretion. *Boyle*, 487 U.S. at 507-11. This Court

ruled that state law would generally not be pre-empted where "[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Id.* at 509.

The government contractor in *Boyle* was required to produce a helicopter escape hatch that opened outward, whereas state law imposed a duty to design the hatch to open inward. *Id.* In this situation, *Boyle* observed that "the state-imposed duty of care that is the asserted basis of the contractor's liability . . . is precisely contrary to the duty imposed by the government contract. . . ." *Id.* at 509.

Unlike *Boyle*, however, UTC's state law duty to warn the Army was entirely consistent with its government contract. The Army expected and relied upon UTC to provide accurate safety information, not instructions that the helicopter was controllable when the exact opposite was true. The *Boyle* defense did not apply because "the suit was not seeking to impose . . . a duty contrary to the duty imposed by the Government contract." *Id.* at 508.

Indeed, UTC's counsel admitted at trial below that "[t]here are no specifications about warnings," acknowledging that the contract did not conflict with state law. A562.

C. There was evidence that UTC, but not the Army, knew about the relevant danger.

The third element of the *Boyle* test is that "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512. The Court found that absent such a requirement, "the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks." *Id.*

The jury was entitled to conclude that UTC had actual knowledge of the danger of loss of control while operating the Blackhawk with one full and one empty ESSS tank, while the Army remained unaware. First, UTC's test pilot testified that he had prior knowledge of special piloting procedures that could have been used to avoid the crash, but UTC did not share that knowledge with the Army until after the crash. A528-29, E411. Second, UTC participated in 1985 testing on an different Nighthawk model that demonstrated the control problems to UTC, but not to the Army. A377-78, E231, E233. Third, UTC added a note to the CG chart in 1991 that handling was "degraded at extremes of lateral CG." E688. UTC argued below that this note warned the Army "about the very danger that caused the accident." A629-30. The jury was entitled to conclude that UTC's note was insufficient to advise the Army of the danger (particularly since UTC failed to retract its false statements), and showed that UTC was aware of a control issue. Finally, UTC never came forward with the technical basis for its statements that the helicopter was "controllable" and "flyable" with one full and one empty ESSS tank. E299, E548. As a result, it was proper for the jury to determine that UTC knew at a minimum that those statements were unsupported and unreliable.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

UTC's Petition makes a vain attempt to manufacture a conflict among the opinions of various circuit courts. Those courts, however, have uniformly defined and applied the elements of the *Boyle* defense. The differences in the cited opinions hinge completely on the unique facts of each case, which UTC ignores. No doubt the circuit courts have used slightly different language to implement *Boyle*, but the substantive tests applied are the same and the results are consistent.

A. The court of appeals below faithfully applied *Boyle* in a manner consistent with other circuit courts.

The court of appeals below, relying upon its prior opinion in *Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626 (2d Cir. 1990), set forth a three part test for the *Boyle* defense in failure to warn cases:

> The three requirements of the *Boyle* test for failure-to-warn cases are: (1) "government control over the nature of product warnings"; (2) "compliance with the Government's directions"; and (3) "communication of all product dangers known to it but not to the Government." *Grispo*, 897 F.2d at 630 n.4.

Densberger, 297 F.3d at 74 n.11. Nearly identical failure to warn tests are set forth in other circuits, including the cases UTC cites. *Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 437 (5th Cir.), *cert. denied*, 531 U.S. 919 (2000); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1003-04 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995).

The courts of appeal have uniformly held that the *Boyle* defense preempts only state laws in "significant conflict" with the federal contract. *Densberger*, 297 F.3d at 74; *Tate I*, 55 F.3d at 1154 (Where "no federal interest 'significantly conflicts' with state law . . . displacement of state law is unwarranted."); *Kerstetter*, 210 F.3d at 438; *Oliver*, 96 F.3d at 1003; *Grispo*, 897 F.2d at 630.

There is also unanimous agreement among the circuits that the government's exercise of discretion must be substantive and meaningful, not a mere "rubber stamp." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Snell*, 107 F.3d at 748. Both *Tate* and *Oliver* found that "[w]hen the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion." *Tate I*, 55 F.3d at 1154, *quoting Trevino*, 865 F.2d at 1480; *Oliver*, 96 F.3d at 999 (same). *Tate* and *Kerstetter* concluded that the *Boyle* defense governed where "the government makes the informed decision not to include a specification or require a warning because, in the government's view, one would be unnecessary or problematic." *Tate v. Boeing Helicopters*, 140 F.3d 654, 660-61 (6th Cir. 1998) *(Tate II)*; *Kerstetter*, 210 F.3d at 438, *quoting Tate II.*

UTC relies heavily on a comment in *Tate* that "cases decided in other circuits applying the government contractor defense to failure to warn claims may require a higher level of government involvement than we think is required." *Tate I*, 55 F.3d at 1157. *Tate* referred in part to the language highlighted below from *Grispo*, which in turn was quoting *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 (D. Conn. 1988):

> The contractor must show that whatever warnings accompanied a product resulted from the determination of a government official, *see Boyle*, [487 U.S. at 512] ("feature in question [must be] considered by a Government officer, and not merely by the contractor itself"), and thus *that*

> *the Government itself "dictated" the content of the warnings* meant to accompany the product. *See Nicholson*, 697 F.Supp. at 604. Put differently, under *Boyle*, for the military contractor defense to apply, government officials must remain the agents of decision.

897 F.2d at 630 (emphasis added). The court of appeals below cited the same language from *Grispo* in its opinion. Petition at 17a.

The term "dictated" was plainly used by the Second Circuit to refer to the *Boyle* requirement of an exercise of government discretion that raises a significant conflict with a state law duty. *Densberger*, 297 F.3d at 74-75; *Grispo*, 897 F.2d at 630; *Nicholson*, 697 F. Supp. at 604. In a similar manner, *Boyle* observed that "[t]he state-imposed duty of care . . . is *precisely contrary* to the duty imposed by the Government contract. . . ." 487 U.S. at 509 (emphasis added). Last year, this Court noted that the *Boyle* defense applied "[w]here the government has *directed* a contractor to do the very thing that is the subject of the claim. . . ." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (emphasis added).

Likewise, *Oliver* found that the defense applied where "this combination of specifications *prevented* [the contractor] from complying 'both with its contractual obligations and state-prescribed duty of care.'" *Oliver*, 96 F.3d at 999 (emphasis added), *citing Boyle*, 487 U.S. at 509. *Oliver* reviewed both *Tate* and *Grispo* (together with two Ninth Circuit decisions) and was not convinced that the cases applied different standards. 96 F.3d at 1004 n.8.

Indeed, contrary to its Petition, UTC argued to the court of appeals below that *Grispo* and *Nicholson* properly set forth the elements of the *Boyle* defense, quoting the precise language set forth above. UTC's Brief at 44-45. Likewise, at trial, defense counsel told the district court that "the *Nicholson* case . . . deals with the manual and I think it's right on point. . . ." A562.

UTC's complaint that the Second Circuit has shown "hostility" to the *Boyle* defense is hollow. Petition at 9. The Second Circuit was one of the first courts to extend *Boyle* to failure to warn claims. *Grispo*, 897 F.2d at 629-30. *Grispo*, which involved the Navy's purchase of commercially available asbestos-based cement, vacated the district court's entry of summary judgment and remanded for a determination whether there was "a genuine issue of material fact pertaining to the government's control over the product warnings. . . ." *Id.* at 627, 633. *Grispo* cited with approval the decision in *Nicholson*, 697 F. Supp. at 604, which held that the *Boyle* defense barred failure to warn claims involving a helicopter manual where the contractor (UTC) established substantive government control and discretion. *Grispo*, 897 F.2d at 629-30, 633. The Second Circuit also applied the *Boyle* defense to preempt a state law product claim where the Air Force approved a contractor's replacement part and accompanying maintenance manual for a jet fighter ejection system. *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83, 89 (2d Cir.) ("[I]t is not our role to second-guess the Air Force's judgment. . . ."), *cert. denied*, 509 U.S. 924 (1993).

Contrary to UTC's claims, the Ninth and Eleventh Circuits have not diverged from *Boyle* or their sister circuits. The Ninth Circuit in *Snell* held the *Boyle* defense applied where the contractor was "acting in compliance with

reasonably precise specifications imposed on it by the United States. . . ." 107 F.3d at 749. *Snell* denied summary judgment because, among other reasons, the contractor had not shown that the government "'approved reasonably precise specifications' constraining Bell's ability to comply with whatever duty to warn it may have had." *Id.* Quite simply, the court found that the contractor had failed in its motion to establish a "substantial conflict" between the contract and state law. *Boyle*, 487 U.S. at 509; *Oliver*, 96 F.3d at 999.

Similar to the facts in *Grispo*, in *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992), the Navy ordered commercially available off-the-shelf asbestos insulation that was "not manufactured with the special needs of the military in mind." *Id.* at 812. The Ninth Circuit found that there was no conflict between state law warning requirements and the Navy's purchase contract. 960 F.2d at 812. *Dorse v. Eagle-Picher Industries*, 898 F.2d 1487 (11th Cir. 1990), involved the same off-the-shelf asbestos insulation, and similarly concluded "that *no* conflict exists between the state tort duty and the federal contractual duty." *Id.* at 1489. *Grispo*, *In re Hawaii* and *Dorse*, are in complete accord with *Boyle*, which specifically recognized that purchases of "stock" items would not be governed by the defense, since the government had expressed no "significant interest" in the product's design. 487 U.S. at 509.

B. The cases cited by UTC are plainly distinguishable.

UTC's assertion of a circuit "conflict" is based on three cases that each granted summary judgment to a contractor because of unopposed proof that the government had prior warning of the relevant danger and a deliberate "trade-off" was made between military requirements and safety.

Moreover, the courts in two of those three cases did not even need to confront the *Boyle* defense because there was *no* state law duty to warn as a matter of law.

Tate considered defective design and failure to warn claims regarding a hook and sling system used to carry loads from a helicopter. The Sixth Circuit found that "the Army *was aware of all of the dangers* . . ." based on the contractor's "Hazard Analysis" that included "detailed information" of the specific risk; as a result, "no reasonable jury could have found that Boeing failed to warn the United States of the relevant danger." *Tate II*, 140 F.3d at 660 (emphasis added).

Similarly, in *Kerstetter*, which involved an allegedly defective pilot restraint system, the Fifth Circuit ruled that there was no duty to warn as a matter of law because it was an "*undisputed fact that the Navy knew about the problem* at least 10 years before the accident. . . ." *Id.* at 439 (emphasis added).

Oliver addressed the design of the fuel system of a Marine Corps truck. The court found that the requirements specified by the Marine Corps for the location and size of the fuel tanks constituted "the type of deliberate trade-off between military mission requirements and safety concerns that is at the heart of the government contractor defense . . ." and that the contractor "provided those warnings required by the government." *Id.* at 999, 1004.

UTC makes the baseless claim that "[t]his case is no different than *Tate*, *Oliver* and *Kerstetter*." Petition at 22. The contractors in those cases, however, established substantive government involvement, knowledge, decision-making and discretion regarding the relevant warnings as a

matter of law. The evidence below, found sufficient to support the verdict by both the district court and the court of appeals, *Densberger*, 297 F.3d at 75-76, demonstrated that UTC not only failed to meet its obligations to provide warnings, but also denied the Army any opportunity to make an informed exercise of discretion by repeatedly providing false flight safety information and failing to correct the error before the crash. Given these circumstances, the court of appeals properly questioned whether the *Boyle* defense should have been sent to the jury at all, because the case strictly involved "UTC's duty to warn *the Army* . . ." and there appeared to be no conflict between state and federal requirements. *Id.* at 75-76 n.13.

C. The "prescribe/proscribe" rule coined by UTC is a sham.

The Petition, in its questions presented and argument, is predicated on UTC's claim that the Second, Ninth and Eleventh Circuit Courts have applied a so-called "prescribe/ proscribe rule." Petition at (I), 18. This "rule," however, is one of UTC's own invention, and does not appear in the opinions of those three circuits (or any other court) regarding the *Boyle* defense. Nor is there any recognition by those circuits that they apply the *Boyle* defense in any manner different from other circuits.

UTC crafts its "rule" by carefully extracting the words "controlled," "constraining" and "prohibited" from various decisions, Petition at 13-14, and giving those words a spin that the courts never intended. Despite UTC's claims, the courts of appeals are in complete agreement that the defense does not require that the government "'prohibit' the contractor from proposing more alarming warnings. . . ."

Tate I, 55 F.3d at 1157. For instance, *Grispo* approved the test set forth in *Nicholson*, where "the court found sufficient, specific government control over the content of the warnings to satisfy the 'reasonably precise specifications' element of *Boyle*." *Grispo*, 897 F.2d at 633. *Nicholson* held that the "contractor is not under a duty to provide every known safety device where it is not called for by government contract." 697 F. Supp. at 603-04. No court has held to the contrary.

To support its argument, UTC speculates on various scenarios not raised by the evidence below. For instance, UTC suggests that these circuits will refuse to apply the *Boyle* defense unless the government itself drafts the relevant warnings. Petition at 13, 19. But the cases from the Second Circuit that actually addressed this issue applied the *Boyle* defense in cases where the government approved a contractor's warning or design. *Lewis*, 985 F.2d at 89; *Nicholson*, 697 F. Supp. at 603-04.

UTC makes the bald assertion that these circuits have attempted to resuscitate a formulation of the defense described in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988), that was rejected by this court in *Boyle*. 487 U.S. at 513; Petition at 18-19. The rejected test required that the government either: (1) design the product itself; or (2) make a conscious decision to proceed despite being advised by the contractor of the danger. 487 U.S. at 513. But there is no suggestion that any case has followed this test after *Boyle*. As discussed above, the courts of appeal have uniformly applied *Boyle's* three-prong test, including the critical requirement of active, informed government discretion. *Boyle*, 487 U.S. at 512 (The proper test must "assure that the . . . feature in question was considered by a Government officer.").

III. THE *BOYLE* DEFENSE CHARGE WAS PROPER; UTC DID NOT OBJECT TO THAT CHARGE AT TRIAL AND CANNOT ASSERT ERROR

The court of appeals found that the charge was "essentially correct" and did not constitute reversible error. Petition at 17a. The charge properly set forth the two fundamental conditions of the *Boyle* defense that the government actively exercised its discretion regarding the relevant warnings in a manner that raised a "significant conflict" with state law. The jury was told to consider whether "the government exercised control over significant details concerning the warnings . . ." and, if so, whether UTC provided "those warnings required of a seller . . . that were not, by the control or direction of the Army, prohibited." Petition at 53a. The charge correctly asked the jury to determine whether the Army's discretionary "control or direction" conflicted with UTC's state law duties.

The jury was also charged on the third *Boyle* element: whether UTC warned the Army of hazards "that were actually known by UTC, but were not known by the Army." The court cautioned the jury: "Whether UTC should have known of a hazard is not an issue that you are allowed to consider. . . . *The only thing that matters is actual knowledge*." Petition at 56a (emphasis added). UTC's repeated suggestions that the district court did not impose a requirement of actual knowledge are wrong. Petition at 10, 25, 26.

UTC *did not object* at trial to the charge language that it now seeks to challenge before this Court. UTC *never* advised the district court that it objected to the instructions regarding

the *Boyle* defense elements, including the use of the word "prohibited" to explain the government's exercise of discretion over warnings.[8]

Having failed to object at trial, UTC is precluded from making a claim that the charge was erroneous. Fed. R. Civ. P. 51 provides that a party may not "assign as error the giving or the failure to give an instruction unless that party objects thereto . . . stating distinctly the matter objected to and the grounds of the objection." UTC did not meet its obligation to make "specific," "distinct" and "clear" objections. *See Moore's Federal Practice 3d*, § 51.12[1][d], p. 51-37, and cases cited therein. Moreover, it is well established that the submission of a proposed instruction is not considered an objection to the instruction as given to the jury. *Id.* at § 51.12[1][e], p. 51-40.

Given the purported significance of the error claimed in the Petition, UTC's failure to object is indefensible. That failure was likely the result of UTC's shifting litigation strategies. At trial, UTC focused on its claim of pilot negligence. Before the court of appeals, UTC's primary claim was that Connecticut state law did not recognize a failure to warn action. In its Petition, grossly distorting the record and improperly rearguing the facts decided by the jury, UTC makes a last ditch attempt to avoid responsibility.

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8. UTC's Petition does not establish that UTC objected to the *Boyle* elements defined in the charge. Before the court of appeals below, UTC did present citations to the trial record, but UTC's only objection to the *Boyle* defense charge addressed the manner in which the plaintiffs' theories were set forth. A582.

IV. THIS CASE DOES NOT HAVE FAR RANGING POLICY IMPLICATIONS

The decision of the court of appeals will not, as UTC suggests, throw military contractors into turmoil. This case addresses a unique situation involving a contractor that gave the military false flight safety instructions. We are aware of no other case addressing the *Boyle* defense that involves similar facts.

While UTC complains that failure to warn claims will "side-step" *Boyle* and render its defense "a practical nullity," Petition at 3, 12, similar arguments were rejected by the circuit courts in *Tate* and *Oliver*, which both cited the Second Circuit's holding in *Grispo* with approval. *Tate I*, 55 F.3d at 1156-57; *Oliver*, 96 F.3d at 1003. Responding to the claim of the *Grispo* contractor that a failure to warn action was an "end run" around *Boyle*, the court stated:

> We disagree. As the *Boyle* Court pointedly explained, "[C]onflict there must be." [*Boyle*, 487 U.S. at 508]. To us, a plaintiff's ability to pursue a failure to warn claim when *Boyle* may foreclose a design defect claim is not indicative of some loophole inadvertently left open by *Boyle*, but rather demonstrates a crucial lack of the necessary conflict between state and federal warning requirements.

897 F.2d at 631.

UTC repeatedly raises the danger of design defect claims "packaged" as failure to warn claims, Petition at 12, 28. But this case was clearly grounded on UTC's false statements and failures to warn, not the helicopter's design.

At the end of the day, UTC seeks absolute contractor immunity absent the exercise of government discretion, akin to the *Feres* doctrine explicitly rejected by *Boyle*. 487 U.S. at 510. This is demonstrated by UTC's argument that compliance with the third *Boyle* requirement for a warning based on the contractor's actual knowledge automatically preempts all state law duties to warn. Petition at 24. There is no question that the *Boyle* defense preempts state law, but only after *all three* of its elements — including the fundamental requirement of an exercise of government discretion in "significant conflict" with the state law duty — are established. In sum, UTC wants to convert the heart of the *Boyle* defense into a rubber stamp to validate its misconduct.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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